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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 15 (PKC)

5 VIRGIL GRIFFITH,

Teleconference

6 Defendant.

7 -----x

8 New York, N.Y.

9 July 23, 2020

2:30 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

United States Attorney for the

15 Southern District of New York

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21 Attorney for Defendant

22 BY: SEAN STEPHEN BUCKLEY

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1 THE COURT: Good afternoon.

2 So this is 20 Cr. 15, United States against Virgil  
3 Griffith.

4 Appearing for the government?

5 MR. KROUSE: Yes, your Honor.

6 This is Michael Krouse, on behalf of the United  
7 States. With me are AUSAs Kimberly Ravener and Kyle Wirshba.

8 THE COURT: All right. Good afternoon to you all.

9 And for the defendant?

10 MR. KLEIN: Good afternoon, your Honor.

11 Brian E. Klein and Keri Axel, from Baker Marquart.  
12 With us is Sean Buckley, from Kobre & Kim. We also have on the  
13 line our client, Virgil Griffith, who is out of custody and  
14 calling in from Alabama.

15 THE COURT: All right. Mr. Klein, am I correct that  
16 your client, Mr. Griffith, waives his physical appearance at  
17 this conference?

18 MR. KLEIN: Yes, he does, your Honor.

19 THE COURT: All right. Now, Mr. Klein, I think  
20 perhaps the first order of business is your motion to dismiss  
21 and related request for a bill of particulars. I've reviewed  
22 the submissions of the parties, but I wanted to give you an  
23 opportunity, if you'd like, to highlight anything in your  
24 papers.

25 MR. KLEIN: Yes, your Honor. I appreciate that. And

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1 I will keep that brief.

2 But I do want to bring your attention first to  
3 something that we only learned at the eleventh hour, literally  
4 last night at 11:00 p.m., which is, last night at 11:00 p.m.  
5 eastern time, we received an email from the prosecutors with  
6 additional discovery disclosures. Among those disclosure was  
7 the disclosure of a search warrant application for the  
8 pertinent email account, the DPRK UN account, dated --

9 THE COURT: The DPRK account?

10 MR. KLEIN: Yes, your Honor.

11 THE COURT: Referring to the Democratic People's  
12 Republic of Korea.

13 MR. KLEIN: Yes, your Honor.

14 THE COURT: Okay. Go ahead.

15 MR. KLEIN: And that is the email account for the  
16 email in question here, the March 6th email, allegedly from our  
17 client to that account.

18 So we received this discovery disclosure last night at  
19 11:00 p.m. eastern time. This morning we emailed the  
20 prosecutors right away asking if they had obtained any  
21 materials in response to that search warrant application. That  
22 application, as we understand it, is they would have received  
23 those materials in late June. We had a phone call very quickly  
24 after with the prosecutors, again, early this morning, my time,  
25 out west, around 7:30 or so. And we specifically asked them

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1 what they had received, and do we have anything. We pointed  
2 out that we believe this is Rule 15, that we would have been  
3 entitled to it. One of the prosecutors confirmed for us that  
4 the IP evidence -- or the lack of IP evidence they received was  
5 the same that we had received in connection with our subpoena.  
6 As your Honor probably knows, we served a subpoena for IP  
7 evidence earlier this year. It's mentioned in our motion.

8 THE COURT: Right. Well, I think -- didn't you make  
9 application to me on that, I think?

10 MR. KLEIN: Yes, we did, your Honor.

11 THE COURT: I thought so.

12 MR. KLEIN: Yeah.

13 THE COURT: Go ahead.

14 MR. KLEIN: So the evidence they had received was  
15 consistent with what we had put in our papers and had received,  
16 which is there is no IP evidence of this email -- or, I'm  
17 sorry, there's no IP evidence during the time period of this  
18 email, which is the March 6th/7th date.

19 We're also asking for any emails or any -- like did  
20 they have a copy of that email. Their contention is that email  
21 was received of that email account. At that time they did not  
22 answer our question. We pointed out again that we thought this  
23 was highly relevant and we were concerned that we were getting  
24 this disclosure so late.

25 A little later this morning, we engaged in some email

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1 back and forth with them. We were busy, but we did learn  
2 something from the them. We got an email around 10:10 a.m. my  
3 time, Pacific time. They wrote us and they said:

4 "Based upon our review to date, the search warrant  
5 appeared not to have yielded content predating September 2019,  
6 and therefore this method of investigation did not request a  
7 copy of the email sent by your client to this account on or  
8 about March 7th, 2019."

9 The email was on March 6th. That was a typo. They  
10 also wrote they were not conceding that the email was received  
11 and they wished to talk to us more.

12 Your Honor, we are very concerned about this late  
13 disclosure, but we also would note --

14 THE COURT: Well, I'm lost. What's the late  
15 disclosure?

16 MR. KLEIN: So, your Honor, they subpoenaed the email  
17 account where the March 6th email was sent. There is no record  
18 that that email is in that account. So there is no record that  
19 the email was ever received in that email account.

20 THE COURT: So they received a response to the  
21 subpoena. And what did the response to the subpoena say?

22 MR. KLEIN: We don't know, your Honor. All we know --  
23 we haven't received the materials they've received. All we  
24 know is that in their looking through those materials, there  
25 are no emails -- what we understand from their response --

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1 before September 2019.

2 THE COURT: Okay. So how is that any different than  
3 what you knew based on your subpoena?

4 MR. KLEIN: Your Honor, so our subpoena asks for the  
5 IP address information. The IP address information shows where  
6 he would have accessed the email account. We did not seek the  
7 content. They're actually -- from what we understand, their  
8 search warrants are for the contents of that account. And  
9 therefore, if they got those contents, they would have  
10 potentially a copy of that email. They do not have a copy. So  
11 this further bolsters our argument that they have no evidence  
12 that an email was ever received, read, or acted upon in this  
13 district. They have no email -- they don't have that alleged  
14 email in that email account. We also don't know what else they  
15 have. They have not provided us any of the search warrant  
16 return materials. All we know is that they did a search  
17 warrant and that they do not have that email.

18 And I can assure your Honor that if they had found  
19 that email in that account, that they would have notified us  
20 right away, because I think they would view that as bolstering  
21 their contention that they have venue in this district.

22 THE COURT: All right. All right. I'm sure you'll at  
23 some point explain to me how this changes where we were before  
24 11:00 o'clock last night. But that's all right.

25 Go ahead.

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1 MR. KLEIN: Yes. Well, I'll explain it to you right  
2 now, your Honor. It's further evidence that they do not have  
3 any proof that the March 6th email was ever received, acted  
4 upon, or read in this district, because, for example, if they  
5 had --

6 THE COURT: Well, let me ask you a question.

7 MR. KLEIN: Sure.

8 THE COURT: If you have an indictment from a grand  
9 jury, the indictment from the grand jury alleges that there is  
10 venue in the Southern District of New York.

11 Shall I have a traverse? Shall I treat this like a  
12 summary judgment motion? Isn't the government entitled to put  
13 on its evidence, and based on the evidence at trial, seek to  
14 draw a reasonable inference from that evidence? And it may be  
15 that the evidence they seek to draw is not a reasonable  
16 inference as a matter of law, in which event I would dismiss  
17 the case. If it is a reasonable inference or could be viewed  
18 as a reasonable inference by a reasonable trier of the fact,  
19 then it becomes the jury question.

20 There's no Rule 56 in criminal practice.

21 MR. KLEIN: Your Honor, I understand your question.  
22 And Rule 12(b)(3) contemplates a motion like the one we  
23 brought. On pages three and four of our reply, we specifically  
24 addressed this question, which is -- if you look at Rule  
25 12(b)(3) it in fact says that a motion like this must be raised

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1 if the basis for the motion is then reasonably available and  
2 the motion can be determined without a trial on the merit. So  
3 the rule contemplates what we're asking you to do. And I don't  
4 think -- your Honor does not need to wait for a Rule 29 motion  
5 before the trial.

6 THE COURT: Well, let's talk about this.

7 So if you have an indictment that fails to allege  
8 venue, then you may and should raise that prior to trial. And  
9 I can grant the motion. Okay? That's absolutely correct.

10 MR. KLEIN: Yes, your Honor.

11 THE COURT: So you're in agreement on that?

12 MR. KLEIN: Yes, your Honor.

13 THE COURT: However, if there is not a defect in the  
14 indictment and the indictment properly alleges venue, how is  
15 that the proper office of a pretrial motion under Rule 12?

16 MR. KLEIN: Yes, your Honor.

17 We do address this issue also in our reply. There are  
18 a series of cases in this district where the issue is addressed  
19 where there is a full proffer by the government or, for  
20 example, a bill of particulars -- but we've pointed out that we  
21 don't think a bill of particulars is necessary, because the  
22 government has provided a full proffer of the evidence for  
23 which they relied on for venue when they presented the  
24 indictment to the grand jury earlier this year -- then the  
25 Court can rule on that. And that's on pages four and five of

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1 our reply, your Honor. So that is contemplated.

2 THE COURT: But here is the situation: The question  
3 is whether a reasonable inference can be drawn by the jury.  
4 Let's go back in time for a moment. Let's go back 50 years,  
5 long before email. There may be no proof whatsoever that an  
6 individual received a certain letter, that that letter ever  
7 arrived in the state of New York. But upon testimony that a  
8 letter was properly addressed to someone in New York with  
9 proper postage deposited in U.S. mail, it would be a reasonable  
10 inference for a jury to draw that the letter was received by  
11 the person to whom it was addressed, even though there's not a  
12 scintilla of evidence that they in fact received it.

13 Now, I realize in a world of electronic media there  
14 are other theoretic possibilities. So the question is, it  
15 seems to me, if a jury could draw a reasonable inference as to  
16 the place of receipt, it's properly a jury question. Whether a  
17 jury can draw a reasonable inference is going to depend on  
18 evidence that I haven't heard, evidence that goes beyond the  
19 four corners of the transmittal of the email, the nature of  
20 what goes on at the Mission of the DPRK in New York, the  
21 instruction from an alleged coconspirator to transmit the email  
22 to the Mission of the DPRK. There are surrounding facts and  
23 circumstances that may make the inference, it would seem to me,  
24 reasonable or may make it unreasonable.

25 Isn't that why a trial is necessary?

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1 MR. KLEIN: Your Honor, let me address those in turn.

2 First of all, I understand the analogy with the  
3 letter. But as your Honor points out, email is --

4 THE COURT: I am ordering that phones be muted unless  
5 you're Mr. Klein, who is speaking at the moment.

6 Okay. Go ahead, Mr. Klein.

7 MR. KLEIN: Yes, your Honor.

8 So with mail, when you address it, there's only one  
9 address you address it to, and it goes to that physical  
10 address. I know your Honor is aware of that. With email, it's  
11 out an ether. The email address could be anywhere, whether  
12 it's Gmail or even your Honor's chambers' address, or someone  
13 could've hacked into it from anywhere. So I think that analogy  
14 is very imperfect and doesn't work in this case.

15 I think the best analogy is the one we offer, which is  
16 to the telephone number. And I think that we've explained that  
17 in our reply. It's very much like when you dial someone's cell  
18 phone number, their cell phone could be anywhere in the world  
19 when they answer it and could be in this district, in your  
20 district, in the Southern District, it could be anywhere else.  
21 So I think the analogy your Honor should focus on is the one we  
22 offer with the cell phone, because that's the most relevant to  
23 this situation.

24 But turning to the question about are there other  
25 facts the government has that it's going to offer. Your Honor,

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1 there aren't any other facts they have to offer. They only  
2 have this email. They don't have any coconspirators'  
3 instructions as far as we know. We have the discovery,  
4 your Honor. They don't have any other facts.

5 THE COURT: So when you say you have the discovery,  
6 you know what the government's evidence is at trial?

7 MR. KLEIN: I do not know all the evidence the  
8 government's going to put on at trial, your Honor.

9 THE COURT: All right. Go ahead.

10 MR. KLEIN: But in the discovery, we have seen nothing  
11 to indicate that they have any other additional information.  
12 Further, in their opposition, they do not offer anything up  
13 like that. So I think to the extent your Honor feels like  
14 there may be additional facts out there to support venue, then  
15 we would actually submit to them a bill of particulars,  
16 because, again, the idea behind this motion, your Honor, is  
17 that we should not -- our client should not have to go to trial  
18 in a district for which there isn't proper venue. And it is a  
19 burden to go all the way to trial only to have the case  
20 dismissed both in terms of the time spent and the cost. And so  
21 we wanted to raise this motion at the earliest appropriate  
22 opportunity, which we believe we have done.

23 We do not believe they have any other evidence than  
24 this email to support venue in this district. They have  
25 offered none in discovery and they've put none in their papers.

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1 And therefore, if their entire proof rests on this email and  
2 undisputed facts surrounding it, and those facts are that it  
3 was not ever read, received, or acted upon in this district,  
4 because there are no facts to support that, it is appropriate  
5 for your Honor to dismiss this indictment at this time.

6 THE COURT: All right. Let me hear from the  
7 government.

8 The government is permitted to unmute its phone.

9 MR. KROUSE: Apologies, your Honor. I was speaking on  
10 mute. This is Michael Krouse, addressing this point.

11 Your Honor, this is -- as the Court I think  
12 recognizes -- a fact question for the jury. The government  
13 will be able to prove by a preponderance of the evidence that  
14 an overt act in furtherance of this conspiracy occurred in this  
15 district. Specifically, as we laid out in our motion papers,  
16 there is real dispute that the defendant sent an email to the  
17 DPRK Mission on March 7th, 2019. There's also no dispute that  
18 that email purpose was to have his travel approved and to  
19 obtain a Visa to the DPRK. There is also no real dispute that  
20 on April 18th, 2019, approximately five to six weeks later, the  
21 DPRK in fact approved Mr. Griffith's travel and issued him a  
22 Visa to the DPRK.

23 THE COURT: But that was not issued out of New York.

24 MR. KROUSE: No, it was not issued out of New York.  
25 But the email was sent to the Mission, which is located in

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1 Manhattan, your Honor.

2           The government's position is that these facts were  
3 presented to the grand jury, the grand jury found probable  
4 cause to believe that venue lied in this district. The  
5 government will present that proof to the jury at trial. And  
6 the jury will be able to infer from that evidence that, beyond  
7 a preponderance of the evidence, an act in furtherance of the  
8 conspiracy occurred in the Southern District of New York to the  
9 DPRK Mission.

10           Even if defense counsel is correct that the proper  
11 analogy here is not the analogy your Honor offered, which is  
12 sending a letter to an address located in Manhattan, but is the  
13 cell phone analogy that the defense offers, the government  
14 would still be able to make arguments to the jury that if the  
15 person who subscribes to that cell phone resides in Manhattan,  
16 even without further evidence, the fact that a communication  
17 was made to that cell phone to a person who resides in  
18 Manhattan, a reasonable inference is that that person at some  
19 point was located in Manhattan in receiving that phone call.

20           And perhaps that wouldn't reach preponderance of the  
21 evidence, but it's certainly an argument available to the  
22 government. And it's much stronger here where the DPRK's sole  
23 mission in the United States is located in Manhattan; the email  
24 address is to that Mission, located in Manhattan; the defendant  
25 -- there's no question -- sent an email to that Mission in

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1 order to secure his travel documents to north Korea; the  
2 defendant received those travel documents and traveled to north  
3 Korea. Those arguments will be made to the jury, and it's the  
4 government's belief that the jury will have no problem finding  
5 that, beyond a preponderance of the evidence, the government  
6 established venue in this district.

7 In any event, as your Honor noted, a grand jury has  
8 found probable cause, and there's no reason for the Court to go  
9 beyond the face of the indictment in resulting this question  
10 here, which is a classic fact question for the jury at trial.

11 THE COURT: All right. Let me give Mr. Klein an  
12 opportunity to respond.

13 MR. KLEIN:

14 MR. KROUSE: Your Honor, sorry. Before that, if I may  
15 just address this point about the government's search warrant  
16 of that account?

17 THE COURT: Yes.

18 MR. KROUSE: Just on the timing of that, your Honor, I  
19 think it's important to note that the defense filed their  
20 motion on June 1st of this year. The government, after  
21 receiving that motion, decided that it would be prudent in its  
22 investigative steps to execute a search warrant on that  
23 account. We got the search warrant on June 5th, 2020. So,  
24 about four days later. After we received the return from that  
25 search warrant, we found that the data itself didn't contain

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1 any emails before September 2019. So as I noted, the email at  
2 issue here was sent by the defendant on March 7th, 2019. So  
3 it's not the --

4 THE COURT: Well, Mr. Klein seems to think it's March  
5 6th. But that's immaterial, I suppose.

6 MR. KROUSE: Yes, your Honor. So either March 6th or  
7 March 7th.

8 So it's not the case that the search warrant returns  
9 just don't have the email. That's not the case. The case is  
10 that the data that was returned to the government in response  
11 to the search warrant doesn't have anything before September  
12 2019. So that's why the government doesn't have this  
13 additional proof that the email was received by that DPRK email  
14 address.

15 But nothing about that changes the analysis for the  
16 Court or the facts that are before the Court. And the  
17 government submits that this was not a late disclosure by the  
18 government. As we said, the search warrant was served on June  
19 5th, 2020. We received returns. We've looked at those  
20 returns, and those returns don't yield anything responsive to  
21 the warrant. So we've provided the warrant to the defense to  
22 allow them to make this argument. We've informed them that the  
23 data predates September 2019, and it's our position that it  
24 doesn't change the analysis for the Court.

25 THE COURT: All right.

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1 Okay. Mr. Klein?

2 MR. KLEIN: Yes, your Honor.

3 So in the government's response, it only highlights  
4 their lack of proof. Your Honor has, under the rules, a  
5 gate-keeping role here and can dismiss at this time for lack of  
6 venue. And the cases contemplate looking beyond just the face  
7 of the indictment in a case just like here.

8 If your Honor is not going to dismiss at this time, we  
9 ask to be able -- we're going to request a bill of particulars  
10 from them, because they again have offered no proof of venue.  
11 If you listen to Mr. Krouse's statement, he says there's this  
12 email, we attached it to our underlying motion. It is March  
13 6th, the date of the alleged email. And all they have is that  
14 email that they allege was sent to that address. They have no  
15 proof it was ever received, ever acted on, or ever read. And  
16 inferences are not evidence, your Honor. So the only evidence  
17 they have is that email. And it's under this exact type of  
18 scenario where the Court should exercise its gate-keeping role  
19 and dismiss this indictment. They can then, if they wish,  
20 reindict it where they have proper venue -- or where they think  
21 they have proper venue.

22 And if they went to the grand jury and told the grand  
23 jury that this email was received in this district, there is no  
24 evidence of that. Again, they only have a sent email, not  
25 received. They have no proof of receipt, no proof it was acted

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1 on. As your Honor pointed out, the Visa was actually issued in  
2 Beijing and says that on it. And they have no proof it was  
3 ever read. So they're asking your Honor to go to trial based  
4 on inferences now when the evidence doesn't support venue. And  
5 that is exactly the kind of case that the case law contemplates  
6 where dismissal is appropriate at this time.

7 THE COURT: But what you don't say -- you're not  
8 saying is that reasonable inferences are permissibly drawn from  
9 evidence and that you don't believe this is a reasonable  
10 inference. That's what you're not saying. You're acting as if  
11 we live in some civil law country where you need a piece of  
12 paper in order to establish a fact, and if you don't have a  
13 documentary trail, then the fact can't be established. And  
14 that's not the system that we operate under.

15 So the question, even looking at it whilst favorably  
16 to your position, is: Can a reasonable inference be drawn?  
17 And if a reasonable inference cannot be drawn, that's a  
18 somewhat -- that's a different situation. But if a reasonable  
19 inference can be drawn, then it's up to the jury to decide  
20 whether or not to draw that inference.

21 Or is it your view -- and please tell me; maybe it is,  
22 and maybe there's case law support for it -- that inferences  
23 play no role in an assessment of venue?

24 MR. KLEIN: Your Honor, first I would start off by  
25 saying we don't think a reasonable inference can be drawn. The

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1 inferences actually all point the other direction, that it was  
2 never received. The IP address information we have doesn't  
3 show that it was ever received in this district. It only shows  
4 that it was more likely than not received or read in another  
5 district, if it was received at all. The search warrant return  
6 details we're now aware of indicate it was not received in this  
7 district. So there is no reasonable inference that it was ever  
8 received, read, or acted upon in this district. So I would  
9 start with that.

10 Your Honor, I think, again, the focus should be on:  
11 What are the undisputed facts? We all agreed for purposes of  
12 this motion about this March 6th email. So that is the only  
13 piece of evidence they have. And there's no reasonable  
14 inference they can draw from that.

15 Now, the fact that they were serving a search warrant  
16 after we filed a motion to try to drum up additional evidence  
17 highlights the weakness of their case. It also highlights  
18 concerns about the presentation they made to the grand jury.  
19 And it further has --

20 THE COURT: Now I think you're grabbing at straws. I  
21 don't know. Usually good lawyers try and bolster their  
22 arguments. You're saying, boy, if they stood up and they said,  
23 your Honor, we didn't bother to serve a search warrant, that  
24 would make their case stronger on this motion, by saying, we  
25 didn't serve any search warrant here?

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1 MR. KLEIN: Your Honor --

2 THE COURT: You would say, well, I got to give them  
3 that, they must have a good case here because they didn't serve  
4 a search warrant. That argument I'm not impress with, quite  
5 frankly.

6 MR. KLEIN: That wasn't the argument I was trying to  
7 make. But I will --

8 THE COURT: Did I miss something? Go ahead,  
9 Mr. Klein. Because I just missed the point of that, then.

10 MR. KLEIN: Well, let me just get to the last point,  
11 which is, your Honor, you asked about the standard of whether  
12 reasonable inferences can be drawn. And our point is, no.  
13 They're stuck with the evidence they have. This is not the  
14 place to start drawing inferences. That would be for the jury.  
15 And so where we are is: Does the evidence they have -- can it  
16 show venue? And the evidence they have cannot should venue on  
17 its face. They have no evidence to support that they're stuck  
18 with speculative inferences, which they cannot rely on they  
19 cannot rely on. If they get passed this point --

20 THE COURT: You didn't really answer the question  
21 though, which is: Is it your position that a venue finding by  
22 a jury cannot be based on reasonable inferences?

23 Is that your position?

24 MR. KLEIN: Your Honor, what happens at trial becomes  
25 preponderance of the evidence. So at that point what the trier

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1 of fact can do, what the jury can do, is different than where  
2 we are at this juncture and what your Honor -- in our opinion,  
3 based on the case law -- is supposed to do, which is look at  
4 the evidence and not put yourself in the shoes of the jury, but  
5 actually just look at the evidence.

6 THE COURT: Well, I respectfully disagree. And I  
7 don't think your argument is consistent with Second Circuit  
8 case law.

9 If a reasonable inference can be drawn from a fact,  
10 the government is entitled to put that to the jury. It may be  
11 a very different situation if there is not a reasonable  
12 inference that can be drawn. But the notion that there is a  
13 demarcation between the pretrial period and the trial, and in  
14 the pretrial period the Court is not permitted to consider  
15 whether a jury could draw a reasonable inference from the facts  
16 because it must look at the facts without inferences.

17 If you have a case for that, I'd sure like to read it.

18 MR. KLEIN: Your Honor, I'll just -- I'm sorry if I  
19 maybe muddled it. But, your Honor, to be clear, there is no  
20 reasonable inference that can be drawn from these facts. We're  
21 not saying that --

22 THE COURT: I understand that.

23 MR. KLEIN: Yeah. We're not saying they cannot be  
24 drawn. We're saying from these facts, which are undisputed  
25 here, there is no reasonable inference to support venue.

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1 THE COURT: That argument, I understand, Mr. Klein.  
2 But what I've asked you several times now is:

3 Do you adhere to the argument that, on the issue of  
4 venue, reasonable inferences cannot be drawn to establish  
5 venue?

6 And I've heard you, I think, twice say: No they  
7 can't -- at least in the pretrial stage, you can't consider  
8 reasonable inferences.

9 I get your argument that a reasonable inference you  
10 submit cannot be drawn here. I get that. But I've asked you a  
11 very different question of whether venue can be found by a jury  
12 drawing reasonable inferences from the facts presented. That's  
13 the question I've asked a couple of times.

14 MR. KLEIN: Yes, the jury can draw inferences from  
15 facts presented. Yes, your Honor. I thought I had said that.  
16 And I'm not sure how the conversation got confused.

17 THE COURT: On the issue of venue?

18 MR. KLEIN: Yes, your Honor. My understanding is --

19 THE COURT: -- then take an account on a motion to  
20 dismiss?

21 MR. KLEIN: Yes, your Honor, the jury can draw those.  
22 And your Honor can look at the evidence, and if there is a  
23 reasonable inference, I believe your Honor could draw it. But  
24 our point is then that there are no reasonable inferences that  
25 can be drawn from the evidence here.

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1 THE COURT: Now I understand you.

2 Go ahead. I didn't mean to distract your argument, so  
3 keep going.

4 MR. KLEIN: I lost my train of thought. And maybe it  
5 was a train that should have been lost, your Honor.

6 But I just want to circle back to the point, which is,  
7 when you look at their briefing, your Honor, and you look at  
8 the fact that they are basing it solely on the March 6th email,  
9 there is no other evidence they have. And if your Honor's  
10 going to say that there might be, then we'd like to do a bill  
11 of particulars, because I think what we will get back from them  
12 is that fact, that it is this March 6th email. And if you look  
13 at that March 6th email, there is no reasonable inference that  
14 can be drawn that it was ever read, received, or acted upon in  
15 this district. Everything points the opposite direction. And,  
16 your Honor should consider that, which is -- and by "everything  
17 points the opposite direction," what I mean is, for example, to  
18 the extent we have evidence about that account, we do know that  
19 it was more than not accessed not from this district. We  
20 provided that evidence to your Honor. So we do have the IP  
21 address record post-dating -- I think it starting in April  
22 2019, almost two-thirds of the time it was accessed outside of  
23 this district.

24 We also have the evidence that the Visa itself was  
25 issued in Beijing, not in this district. We also have the

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1 evidence that there wasn't a response to this email. There is  
2 no evidence that that this email was responded to, that anyone  
3 wrote back to our client or wrote to someone else to say that  
4 they were writing about this email. So there is no evidence  
5 that this was read, received, or acted upon.

6 And to the extent there are these logical leaps the  
7 prosecutors -- they're basically saying, our client wrote an  
8 email, and a month later he got a Visa in Beijing, therefore,  
9 the email must have been received in this district. That  
10 defies logic. There was no response.

11 THE COURT: Let me inquire of the government.

12 How do you plan to address the assertion -- or how do  
13 you plan to address at trial the assertion that in two-thirds  
14 of the cases there is proof that emails were received outside  
15 the district?

16 MR. KROUSE: Your Honor, what I'll say on this  
17 reasonable inference point and on the bill of particulars  
18 point, the bill of particulars is not necessary in the  
19 government's view because the government and the defense  
20 largely agree on the facts here. So from the government's  
21 perspective, an email being sent -- well, let me back up for  
22 one minute.

23 A coconspirator telling the defendant, in order to  
24 travel to the DPRK you need to email the Mission in Manhattan  
25 at this email address; he then sends an email to the Mission,

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1 which is located in Manhattan, asking permission; he's then  
2 approved to travel, and a Visa is issued in this other location  
3 in China, a reasonable inference from that is that the DPRK  
4 Mission located in Manhattan received the email sent by the  
5 defendant, which he understood was being sent to the Mission in  
6 Manhattan, and then he was approved to travel. So that is a  
7 classic reasonable inference. It's not something wildly  
8 speculative, as the defense is making it sound.

9 It's also not the case that there's all this other  
10 evidence that points in the opposite direction. The couple of  
11 times Mr. Klein references the search warrant results -- and  
12 it's the government's position that the search warrant results  
13 are neither here nor there because --

14 THE COURT: Well, I got that point. I don't need to  
15 hear more on that. But I don't think you've addressed the  
16 question that I asked you, which is:

17 The argument that's being advanced is that in  
18 two-thirds of the instances, emails that were sent to this  
19 email address were first accessed outside of the district; and  
20 based on that, why wouldn't it be unreasonable to draw the  
21 inference that it was received in Manhattan? It may be -- for  
22 example, you could be somebody standing in Vermont getting the  
23 email and forwarding it to someone in Beijing or in North  
24 Korea.

25 So explain to me why in the face of what I'm being

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1 told, that two-thirds of the emails were received outside the  
2 district, that it would not be a reasonable inference to infer  
3 that this one was received or first accessed in the Mission?

4 MR. KROUSE: Yes, your Honor.

5 And this demonstrates why it's a question of fact,  
6 because the fact that an IP address results to a certain  
7 location does not mean that that person who accessed the email  
8 was in that location. The government could introduce evidence  
9 from an expert witness or from a lay witness, frankly, that  
10 there are technological means to mask where a person is  
11 accessing an email. A VPN can be used, various other  
12 technological means. But just because an IP address shows that  
13 someone's accessing an email in, say, Nebraska, doesn't mean  
14 that person is actually located in Nebraska. It's very  
15 possible -- and, in fact, likely -- that they were located in  
16 New York using a VPN to mask their location. So that's one  
17 issue.

18 The second answer is the government would introduce  
19 evidence that personnel affiliated with the DPRK Mission have  
20 extremely limited ability to travel outside certain locations.  
21 So they're allowed to be in Manhattan. They can travel to -- I  
22 want to get this right. But I believe that their Visa limits  
23 them to a certain radius around the DPRK Mission. So if  
24 there's an IP address that shows that the DPRK admission -- so  
25 okay, I'm getting -- it's 25 miles from Columbus Circle, is

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1 what they're limited to by the terms of their Visa. So to the  
2 extent it's showing that the DPRK Mission is accessing emails  
3 in Portland, Oregon, that's highly unlikely based on their  
4 travel restrictions, and it bolsters the argument, in the  
5 government's view, that they're simply using technology means  
6 to mask where the emails are being accessed. So that would be  
7 our response to that argument. And that's what the evidence,  
8 we believe, would show at trial.

9 But as far as whether a reasonable inference can be  
10 drawn, the DPRK Mission is located in Manhattan. The defendant  
11 knew that. He sent an email to that Mission in Manhattan. And  
12 a reasonable inference can be drawn that it was received in  
13 Manhattan.

14 THE COURT: Okay. Let me give Mr. Klein an  
15 opportunity to respond to that. And then I'm going to reserve  
16 decision on the motion and we'll move on to the bail  
17 application.

18 Go ahead, Mr. Klein.

19 MR. KLEIN: Yes, your Honor.

20 I'll start out with this, because, as your Honor knows  
21 and we all know, an email can be accessed anywhere. And so the  
22 government arguing about a VPN and how it might support the  
23 idea that it was accessed in Portland, Oregon or Dublin doesn't  
24 prove anything. It just proves that maybe someone with a VPN  
25 was accessing it from somewhere. For all we know, this account

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1 could have been accessed from North Korea this entire time.

2 But what we do know is that two-thirds of the time it was not  
3 accessed in this district.

4 We also know --

5 THE COURT: Well, where was it accessed two-thirds of  
6 the time?

7 MR. KLEIN: So the places include Virginia; Ireland;  
8 Abidjan; Portland, Oregon. Those are the IP addresses. So if  
9 you look at the information we have as an exhibit, two-thirds  
10 of the time the IP addresses reflect it was not accessed in  
11 this district.

12 And actually, your Honor, even if it shows it was  
13 active in this district, just so you know, a VPN -- to the  
14 government's point -- you can select and use a VPN like you can  
15 select where you're coming from, and someone could be accessing  
16 it from North Korea but choosing to show this district. So all  
17 we have is the account was accessed from all over the world,  
18 and two-thirds of the time the IP address shows not from this  
19 district. But it's not reasonable to say, well, one-third  
20 shows that it was and two-thirds doesn't. The only reasonable  
21 inference from that information is that it was accessed outside  
22 of this district.

23 And the fact that the personnel are constrained to  
24 this district is irrelevant, because we don't know who had  
25 access to this email account. And what we do know is when it

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1 was accessed, it was accessed outside of this district  
2 two-thirds or a vast majority of the time.

3 And so they do not have a reasonable inference that  
4 this email was ever received, read, or acted upon in this  
5 district. They may have a reasonable inference that it was  
6 sent to this district in the sense that that was the intention  
7 or maybe this was the intention, but it needs to have been  
8 read, received, or acted upon.

9 So the fact that if you look at the email our client  
10 might have thought it was going to "that email account" -- I'm  
11 going to be clear. They're conflating these two things. I  
12 should be clear myself.

13 The inference that it was sent to that email account  
14 and that the email account was associated with the Mission,  
15 just because there's an email account that might be associated  
16 with the Mission does not mean that it is accessed at that  
17 Mission or even by that Mission.

18 THE COURT: No. I understand that. In fact, your  
19 position is -- and if you've got a confirmatory email that says  
20 thank you for your email, and it's sent purportedly from the  
21 Mission, that doesn't confirm it either. There's no way ever  
22 to confirm where the person was when they accessed it because  
23 of VPN technology. I get that. I get your point.

24 MR. KLEIN: Your Honor, you know, there is no way to  
25 know where they accessed it. But that goes back to our

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1 telephone analogy we used, which is you know when the  
2 government tries to prove location to establish venue in this  
3 district, they have a cooperator say, hey, I'm walking on 98th  
4 Street in Manhattan, right? And they have that cooperator come  
5 in and say, yes, I was on a cell phone and I was talking to  
6 defendant X, and I was on 98th Street and that's why I said  
7 that.

8 THE COURT: Right.

9 MR. KLEIN: So that's how they regularly prove venue.  
10 There is nothing like that here. In fact, it's the exact  
11 opposite. And so, therefore, again, our position is there is  
12 no reasonable inference, they have no evidence it was ever  
13 received, read, or acted upon. And we would ask your Honor to  
14 dismiss at this time based on our motion.

15 THE COURT: Thank you.

16 Mr. Klein, why don't you turn, if you'd like to, to  
17 your bail application.

18 MR. KLEIN: Yes, your Honor.

19 I saw the government filed a response, but I will tell  
20 your Honor it was filed today, and I did not have a chance to  
21 read it.

22 THE COURT: All right. Would you like to do this at  
23 another time?

24 What's your pleasure?

25 MR. KLEIN: Yeah. We'd like to do it as soon as

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1 possible, your Honor, so I don't know if -- we would like to  
2 submit a written reply. So if we could come back tomorrow for  
3 a quick hearing. And I apologize, your Honor, but it was  
4 filed, you know, just shortly before this hearing.

5 THE COURT: How about 1:30 tomorrow? Does that work  
6 for everybody?

7 MR. KLEIN: Yes, your Honor, that works for me. But  
8 it might be that one of my colleagues will argue it. And give  
9 me a moment to confirm that everyone's available.

10 May I have one minute, your Honor?

11 THE COURT: Yes.

12 (Pause)

13 MR. KROUSE: And, your Honor, the government is  
14 available at 1:30 tomorrow.

15 THE COURT: All right. Thank you.

16 MR. KLEIN: Your Honor, that works for us. Thank you  
17 for offering that time.

18 THE COURT: All right. And, Lisa, I don't know if you  
19 could let your office know that we're doing this.

20 Okay. So that's what we'll do.

21 Now, it seems to me that new information came up at  
22 this hearing. Unless somebody wants to correct me, but I do  
23 not recall -- and I might have overlooked reading about this  
24 25-mile rule.

25 Mr. Krouse, is that in your papers?

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1 MR. KROUSE: Your Honor, it's in our written response  
2 and our reply, and it was in their papers.

3 THE COURT: Okay. All right. As long as -- I just  
4 wanted to make sure everybody had a fair opportunity, because I  
5 was going to let you put something in if they hadn't raised it  
6 in their papers. But you've responded, so that that seems to  
7 be taken care of.

8 So we'll reconvene tomorrow at 1:30 on the bail issue.

9 MR. KROUSE: Your Honor?

10 THE COURT: Yes.

11 MR. KROUSE: If it pleases the Court, whether we want  
12 to talk about any type of further scheduling today or after  
13 tomorrow?

14 THE COURT: Well, in terms of scheduling, what did you  
15 have in mind?

16 MR. KROUSE: Your Honor, the parties at least have  
17 talked about a motions schedule, and I believe at the last  
18 conference your Honor mentioned wanting to set a further  
19 motions schedule. So the defense has filed their venue motion,  
20 but I believe they also intend to move to suppress certain  
21 items and possibly have another motion to dismiss, is my  
22 understanding from our conversation.

23 THE COURT: Let me hear from Mr. Klein.

24 Mr. Klein?

25 MR. KLEIN: Yes, your Honor. We did have a couple

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1 conversations this week with the prosecutors about a potential  
2 motions schedule. But we also did receive, after that, some  
3 additional discovery. And we're still trying to understand how  
4 much more discovery we will be getting and how soon. So, you  
5 know, we do have some contemplated motions and we had thought  
6 about a date for them, but we are concerned about, you know,  
7 when we will have all the discovery. Like I said, just last  
8 night, we got a new search warrant application. And obviously  
9 that could be subject to a motion to suppress or another type  
10 of motion, so --

11 THE COURT: Listen. In setting a motions schedule, I,  
12 of course, cannot hold you to something that hasn't yet been  
13 produced. It can only be based on what's been produced today.  
14 So, you know, do you have -- what motions are you  
15 contemplating?

16 MR. KLEIN: So we were thinking about an October  
17 motions schedule for our motions. And we have a number of  
18 motions contemplated.

19 THE COURT: What are they?

20 MR. KLEIN: A motion to dismiss.

21 THE COURT: On what basis?

22 MR. KLEIN: Failure to state a claim.

23 THE COURT: Failure to state a claim?

24 MR. KLEIN: Well, equivalent of the indictment  
25 defective on its face, your Honor. Sorry.

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1 THE COURT: Okay. Go ahead.

2 MR. KLEIN: A motion to suppress at least some of the  
3 search warrant, is an issue.

4 THE COURT: All right. And what's the basis for the  
5 motion to suppress?

6 MR. KLEIN: I'll let Mr. Buckley take the lead on  
7 that.

8 THE COURT: Yep.

9 MR. BUCKLEY: Yes, your Honor.

10 And this was one of the items that we've requested  
11 some additional information from the government about, and  
12 they've agreed to provide us with the information in the  
13 relatively near term. But it's a two-fold motion that certain  
14 of the search warrant affidavits resulted in overbroad  
15 discovery from the government, in that the facts set forth in  
16 the affidavits don't support the breadth of the release that  
17 they received.

18 THE COURT: All right.

19 MR. BUCKLEY: And in addition to that, we are  
20 contemplating a -- depending on the responses we receive from  
21 the government, a motion akin to what was litigated in *United*  
22 *States v. Wade*, before Judge Nathan, where, in addition to the  
23 warrants being overbroad, questions in so far as compliance  
24 with the warrants and the materials actually seized pursuant to  
25 those warrants and the timing of those seizures in compliance

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1 with the warrants.

2 THE COURT: All right. I'm not sure I understand that  
3 one, but I'm sure you'll make it clear in your papers. All  
4 right.

5 MR. BUCKLEY: I'll certainly try to make it clearer  
6 than I did here, your Honor.

7 THE COURT: All right. And anything else?

8 MR. KLEIN: It's possible, your Honor, that we will  
9 reach a resolution with the government where we won't need to  
10 file motion to compel on certain issues. So that's a  
11 possibility. We also plan to submit the demand for  
12 particulars. It's possible we'll be filing a motion for a bill  
13 of particulars.

14 THE COURT: All right. And you'd like to make these  
15 motions when?

16 MR. KLEIN: We were contemplating October, your Honor.

17 THE COURT: All right.

18 MR. KLEIN: Your Honor, there's one other type of  
19 motion. Sorry.

20 THE COURT: Yes.

21 MR. KLEIN: Rule 15. We've been receiving discovery,  
22 including this week, about foreign witnesses. And so we are  
23 contemplating the need for a Rule 15 motion.

24 THE COURT: Help me out with that. What relief would  
25 you be seeking in this Rule 15 motion?

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1 MR. KLEIN: To take the testimony of foreign  
2 witnesses.

3 THE COURT: All right. Would it be convenient for you  
4 to file your motions on October 9th?

5 MR. KLEIN: Your Honor, only for scheduling reasons  
6 because of the east-coast/west-coast time frame. It makes it a  
7 little easier and doesn't ruin our Friday nights, if that makes  
8 a difference to your Honor.

9 THE COURT: No. Listen, if I give you till -- I'm  
10 going to give you till October 8th. But if I give you till  
11 October 9th, you can file them on October 6th.

12 MR. KLEIN: I know, your Honor. And that's always our  
13 hope, to file earlier. But I'll tell you, in practice, you  
14 know, you're usually filing them on the date they're due and  
15 later in the evening, unfortunately.

16 THE COURT: Okay. So let's make it October 8th.  
17 And would it be convenient for the government to  
18 respond by November 5th?

19 MR. KROUSE: Yes, your Honor, that's fine.

20 THE COURT: And a reply, I think -- let's see.  
21 Thanksgiving is the 26th.

22 Would it be convenient to get your reply in by the  
23 19th of November?

24 MR. KLEIN: Yes, your Honor. That works for us.

25 THE COURT: Okay. All right. So that's the motions

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1 schedule. And I think the filing of the motions by operation  
2 of law excludes time. And I think time may be excluded in any  
3 event because of the pandemic situation. But I will indicate a  
4 motion to exclude time through November 19th.

5 MR. KROUSE: Your Honor, the government moves to  
6 exclude time between now and November 19th to allow the defense  
7 to file motions and the government to respond.

8 THE COURT: Any objection?

9 MR. KLEIN: No your Honor.

10 THE COURT: All right. I find that the end of justice  
11 will be served by granting an exclusion and an extension on  
12 briefing through November 19th. The reasons for my finding --  
13 well, I'll say that I believe the need for the time outweighs  
14 the best interests of the public and the defendant in a speedy  
15 trial. And the reasons for my finding are that there are  
16 challenging motions that the defense is contemplating. They  
17 need time for briefing them for a response to the motions, and  
18 a reply, and also taking into account the present circumstances  
19 of the national emergency because of the pandemic.

20 So accordingly, the time between today and November  
21 19th is excluded under the Speedy Trial Act.

22 Is there anything further from the government?

23 MR. KROUSE: Yes, your Honor.

24 Just two matters that are fairly short. So first, we  
25 just want to inform the Court -- and we've informed the defense

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1 about this -- that there will be some classified information  
2 litigation in this case. It's not extensive. But the  
3 government is in the process of assessing its CIPA motion  
4 practice in this case. And part of the challenge has been  
5 coordinating with the various agencies in order to conduct an  
6 in-person review.

7 So we just want to let the Court know that a motion  
8 will be filed, and have the opportunity to perhaps speak to the  
9 Court again about a schedule for that briefing once we've had a  
10 little more time to coordinate with the various agencies. So  
11 we were thinking that we could put in a letter and ask for  
12 exception two under CIPA in about three weeks, if that's  
13 acceptable to the Court.

14 THE COURT: That sounds fine. Let me ask a question.

15 Mr. Buckley, do you have clearance?

16 MR. BUCKLEY: I don't currently hold clearance,  
17 your Honor, but I am still what they call "within scope," which  
18 means it's a very short application process because my  
19 background check remains current.

20 THE COURT: Good. Okay. That's fine. In the event  
21 it's needed. Got it. Thank you.

22 MR. BUCKLEY: Okay. Thank you, Judge.

23 THE COURT: Go ahead, Mr. Krouse.

24 MR. KROUSE: Thank you, your Honor.

25 And then just the second issue is, the government and

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1 the defense have spoken about an additional protective order to  
2 cover 3500 type productions. The government has already  
3 produced early 3500 for three witnesses to put the defense in a  
4 position to know what those witnesses have said and to  
5 contemplate their Rule 15 deposition motions that they've  
6 spoken to the Court about just briefly a second ago.

7 So the government and the defense have arrived at an  
8 agreed-upon protective order. And we'll submit that to the  
9 Court for the Court's signature. And we are available to  
10 answer any questions about that tomorrow.

11 THE COURT: That's absolutely fine. Thank you very  
12 much.

13 And is there anything further from the defendant?

14 MR. KLEIN: Your Honor, there's not anything further  
15 from the defense.

16 THE COURT: All right. Let me say that I think the  
17 motion to dismiss has been well argued by the attorneys for the  
18 defendant and for the government. The presentations were  
19 clear. I make no apologies for asking pressing questions.  
20 That's how I get to the bottom of things in probe. But I do  
21 believe that the advocates on each side well acquitted  
22 themselves in a very professional and competent presentation.  
23 And for that I thank you.

24 With that, we are adjourned.

25 MR. KROUSE: Thank you, your Honor.

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1 MR. KLEIN: Thank you, your Honor.

2 MR. BUCKLEY: Thank you, your Honor.

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